82-1741

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CARLOS MANUEL ROJAS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the absence at trial of an informant who was an active participant in an illegal drug transaction deprives the accused of his constitutional right of confrontation.

LIST OF ALL PARTIES

The other party involved in this case is Gerardo Flores-Macias, a co-defendant.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 22, 1983, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....

STATEMENT OF THE CASE

Petitioner was indicted on April 22, 1981, on several federal narcotics violations. Petitioner was charged with one count of violating 21 U.S.C. § 846 (conspiracy to possess with intent to distribute and to distribute heroin, Count I); two counts of possession with intent to distribute heroin (Counts II and IV) in violation of 21 U.S.C. § 841(a)(1); and one count of distribution of heroin (Count VI) in violation of 21 U.S.C. § 841(a)(1).

The subject matter jurisdiction in the district court is based upon said indictment for the commission of federal crimes.

Petitioner plead not guilty as to all counts.

At the conclusion of the government's presentation of its case, the District Court judge granted a judgment of acquittal on behalf of petitioner as to overt acts numbers one and two of Count I, and as to Counts II and IV.

After a trial by jury, petitioner was convicted on Counts I and VI.

During the trial, petitioner twice made Motions to Dismiss on the grounds that he had been denied access to the informant at trial and thus denied his right of confrontation and cross-examination. Those motions were denied. At other points of introduction of evidence as to Count VI, petitioner objected on the basis of the denial of the right of confrontation.

In holding that the government had satisfied the requirements of law that reasonable efforts be made to produce the informant, the District Court judge expressly stated that since the informant would not be produced there would be no testimony from any witness as to any statements made by the informant—that any statements made by the informant to any government agent were hearsay (It was thereafter discovered that the informant's body was found in the trunk of a car and that he most likely had been killed two weeks prior to trial).

The government's case against petitioner consisted predominantly of evidence of an informant's contacts with petitioner and co-defendant Flores-Macias through the testimony of various government agents from the Drug Enforcement Administration and various police departments,

as well as the transcriptions of two tapes of conversations between petitioner and the informant. Except for the allegations of Count VI, the informant was the only alleged precipient witness to any exchange of heroin in the government's indictment.

Prior to trial, petitioner filed a disclosure of informant motion. At the hearing of that motion on August 27, 1981, the motion was held in abeyance as the government agreed to provide the name of the informant and an assurance that the informant would be produced at trial. It was not until the first day of trial that petitioner was informed that the informant could not be located.

On appeal, the Court of Appeals affirmed petitioner's conviction.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION CONCERNING A CRIMINAL DEFENDANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The Sixth Amendment to the United States Constitution grants a criminal defendant the right to confront the witnesses against him.

In *Pointer v. Texas* (1964) 380 U.S. 400, this Court stated that the Sixth Amendment's Confrontation Clause includes the right of an accused in a criminal case to cross-examine the witnesses against him. *Supra* at 404. Indeed, in that case this Court reaffirmed that the right of cross-examination is a major reason underlying the constitutional confrontation rule. *Supra* at 406, 407.

On appeal to the Ninth Circuit, the petitioner contended that the absence of the informant at trial deprived him of his right of confrontation.

In the decision below, the Ninth Circuit determined that petitioner was not denied his Sixth Amendment right of confrontation because the informant's credibility was not an issue at trial. Due to the absence of the informant, the trial court judge excluded any evidence from the government's agents as to any conversation or statement made by the informant or to the informant, leaving as the principal evidence against petitioner the testimony of the government's agents as to the informant's activities with petitioner as observed by those agents. The Ninth Circuit stated that the informant's conduct was neither credible nor incredible, and that therefore the informant's credibility was not at issue.

This ruling of the Ninth Circuit, however, ignores the fact that the informant was, except as to Count VI of the indictment, the only active

participant with petitioner in any alleged exchange of heroin. As such, the informant was the only possible material witness that petitioner could have cross-examined to impeach the government's evidence as to the allegations of petitioner's illegal conduct.

The Ninth Circuit's interpretation of the Confrontation Clause in this instance is contrary to the thrust of this Court's decision in *Douglas v. Alabama* (1964) 380 U.S. 415. There, this Court recognized that a criminal defendant can be denied his right of confrontation by the use of evidence that is not technically testimony and thus not subject to cross-examination.

This Court held that the petitioner's rights under the Confrontation Clause of the Sixth Amendment were violated by the prosecutor's reading of a purported confession of petitioner's co-defendant, who had been tried separately. The prosecutor asked the co-defendant to confirm or deny statements that inculpated the petitioner in the crime charged. The co-defendant invoked the privilege against self-incrimination and refused to answer.

This Court stated that although the reading and the refusal to answer were not technically testimony, the reading may well have been the equivalent of testimony to the jury. Together with the fact that the co-defendant invoked the privilege against self-incrimination, a situation was created in which the jury might improperly infer that the statement inculpating petitioner was true. Yet, petitioner was unable to cross-examine the co-defendant because of his reliance on the privilege against self-incrimination.

This Court held that the petitioner's inability to cross-examine the co-defendant denied the petitioner the right of cross-examination secured by the Confrontation Clause. *Supra* at 419.

Although three law enforcement officers identified the statement as being a confession made and signed by the co-defendant, this Court determined that petitioner's opportunity to cross-examine those officers did not redress that denial. Rather, this Court believed that such testimony made it even more likely that the jury would infer that the statements were true.

Furthermore, since the testimony of the officers only showed that the co-defendant had made the statement, any cross-examination of the officers as to the genuineness of the statement could not substitute for the cross-examination of the co-defendant as to the truth of the statement. *Supra* at 420.

Here, the testimony of the government's agents as to the informant's activities with the petitioner was the principal evidence offered by the government to prove its case against petitioner. Yet, the petitioner was precluded from cross-examining the informant himself. Petitioner was only able to cross-examine the government agents who had observed the informant's actions.

As this Court clearly stated in *Douglas v. Alabama, supra*, the cross-examination of government agents as to their observation of an event does not satisfy the requirement of the Confrontation Clause, since such observation does not prove the truth of the implications of the observed activity.

Here, the informant alone knew what actually happened between he and the petitioner. To satisfy petitioner's right of confrontation it is imperative that he have an opportunity to confront the informant and cross-examine him as to the circumstances of their activity together. As it happened, the petitioner was left without an effective means of controverting the testimony of the government agents, who can only testify to the fact that they observed the informant and petitioner together. The Ninth Circuit's determination that the above-described situation does not violate petitioner's right of confrontation fails to meet the constitutional standard set by this Court in *Douglas v. Alabama, supra*.

Furthermore, in light of this Court's decision in *Roviaro v. United States* (1956) 353 U.S. 53, the Ninth Circuit's decision is manifestly unfair to petitioner. In *Roviaro* this Court found reversible error in the trial court's refusal to order the government to disclose the identity of an informant who was an active participant in the alleged illegal drug transaction.

This Court there held that the informant's possible testimony was highly relevant and might have proved helpful to the petitioner's defense. Apart from the petitioner, the informant was the one material witness who could contradict the testimony of the government's witnesses. This Court stated that cross-examination of the police officers involved was no substitute for petitioner's opportunity to examine the informant, who had been nearest the petitioner throughout the alleged illegal transaction. The informant had helped set up the criminal activity and had played a prominent part in it. His testimony might have disclosed entrapment. *Supra* at 64.

Here, the government waived any argument as to privilege and agreed to produce the informant at trial. Yet, because of the untimely cir-

cumstance of the death of the informant prior to trial, the petitioner was left without any means of effectively challenging the evidence produced by the government. In making his motions for dismissal the petitioner argued to the trial court that the informant's presence went to petitioner's defense on the ground of entrapment.

If, as this Court held in *Roviaro v. United States, supra,* it is unfair to prevent a criminal defendant from cross-examining an informant whose testimony may possibly prove helpful to that defendant's defense, it is surely unfair in the present circumstance to allow the government to establish its case against petitioner through the use of evidence that has not been subjected to the scrutiny of cross-examination. The government should not be permitted to take advantage of the fact of the informant's death prior to his testimony being taken.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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April 23 1983

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 82-1133

CARLOS MANUEL ROJAS, D.C. No. CR 81-81 MLS

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 82-1134

GERARDO FLORES-MACIAS, D.C. No. CR 81-81 MLS

Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, Judge
Submitted December 13, 1982

BEFORE: WALLACE AND FERGUSON, Circuit Judges,
and GRANT,* Senior District Judge.

*Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

Each of the appellants complains that a government informant (Barrera), who was involved in the negotiations to buy and sell heroin that led up to their indictments and convictions, was not produced at trial. They challenge the district court decision that the government had done everything reasonably necessary to produce the informant at trial, and, further, allege that they were denied their Sixth Amendment right of confrontation because the informant did not appear at trial.

Counsel for appellant Rojas had interviewed the informant at the U.S. Attorney's Office some ten weeks before trial, but counsel for appellant Flores-Macias chose not to interview the informant that day, but elected to interview him just prior to trial. Neither appellant subpoenaed the informant.

Prior to this case, Barrera had worked with government agents on some ten cases and had testified in two of them. In preparation for this case, he had reported in regularly, but these calls stopped about ten days before trial. Thereupon, the Drug Enforcement Agents became concerned and made diligent search at his residence and places that he was known to frequent, plus inquiries to his family and his girl friend, but these efforts failed to provide any clue as to his whereabouts. A government agent testified that he never put an informant under subpoena to assure his appearance at trial in such cases.

Barrera did not testify at trial. One month later his body, evidencing many stab wounds, was discovered in the trunk of his car. The coroner testified that he had been killed in mid-November, some two weeks before the trial.

The government is required to make reasonable efforts to produce the informant at trial. *United States v. Glickman*, 604 F.2d 625, (9th Cir. 1979). Barrera had a good history of making his previous court appearances when required to testify. The Court found that the government in this case did everything reasonably necessary to produce the informant, and we do not find the district court's ruling clearly erroneous.

At the conclusion of the hearing regarding the government's efforts to locate the informant, the Court ruled that it would exclude evidence from any agent as to any conversation or statement made *by the informant* or out of the presence of the defendant against whom that statement was offered. Thus, the government was strictly limited to testimony concerning the informant's activities on various days. Conduct is neither credible nor incredible, and Barrera's credibility was not an issue in this trial. This is not the assertive conduct (pointing out the home which

was the source of heroin) which the Fifth Circuit considered in *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978) and upon which appellants rely. Appellants' argument is without merit. There was no denial of their Sixth Amendment right of confrontation.

Appellant Flores-Macias alleges that the trial court should have granted judgments of acquittal on overt acts III and IV. But an overt act is not a criminal charge nor is proof of every overt act an essential element of a conspiracy. *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Lee*, 622 F.2d 787 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981).

Finally there was abundant evidence from which the jury could find appellants guilty beyond a reasonable doubt.

Appellants' convictions are affirmed.

Certificate of Service

I hereby certify that on this 23rd day of April, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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